



Montana Secretary of State
Corey Stapleton

ENERGY &
TELECOMMUNICATIONS
INTERIM COMMITTEE 2019-2020

September 23, 2019

Exhibit 15

[HOME](#) [SEARCH](#) [ABOUT US](#) [CONTACT US](#) [HELP](#)

Montana Administrative Register Notice 38-2-243

No. 18 09/20/2019

[Prev](#)

[Next](#)

BEFORE THE DEPARTMENT OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

| | |
|--|-----------------------------|
| In the matter of the amendment of ARM) | NOTICE OF PUBLIC HEARING ON |
| <u>38.2.3301</u> and the repeal of ARM) | PROPOSED AMENDMENT AND |
| <u>38.2.4204</u> pertaining to discovery and) | REPEAL |
| pre-filed testimony procedures, or) | |
| alternatively the amendment of ARM) | |
| <u>38.2.3301</u> and <u>38.2.4204</u>) | |

TO: All Concerned Persons

1. On October 29, 2019, at 1:30 p.m., the Department of Public Service Regulation and the Public Service Commission (commission) will hold a public hearing in the Bollinger Room, at 1701 Prospect Avenue, Helena, Montana, to consider the proposed amendment and repeal or alternatively the amendment of the above-stated rules.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the commission no later than 5:00 p.m. on October 15, 2019. Please contact Vicki LaFond-Smith, Department of Public Service Regulation, 1701 Prospect Avenue, Helena, Montana, 59620-2601; telephone (406) 444-6170; fax (406) 444-7618; TDD/Montana Relay Service (406) 444-4212; or e-mail vicki.lafond-smith@mt.gov.

3. The rules proposed to be amended by one of the two proposed alternatives provide as follows, new matter underlined, stricken matter interlined:

Rule Amendment Option 1:

38.2.3301 DISCOVERY AND INVESTIGATION (1) ~~Techniques of prehearing discovery permitted in state civil actions may be employed in commission contested cases, and for this purpose the commission adopts rules 26, 28 through 37 (excepting rule 37(b) (1) and 37(b) (2) (d) of the Montana rules of civil procedure thereto. In applying the rules of civil procedure to commission proceedings, all references to "court" shall be considered to refer to the commission; references to the subpoena power shall be considered references to ARM 38.2.3302 through 38.2.3305; references to "trial" shall be considered references to hearing; references to "plaintiff" shall be considered references to a party; and references to "clerk of court" shall be considered references to the staff member designated to keep the official record in commission contested cases. Pre-filed written testimony, pre-filed written cross-examination, and responses to that pre-filed written cross-examination are the primary methods of inquiry and investigation prior to an evidentiary hearing in commission contested case proceedings.~~

(2) ~~Nothing in (1) of this rule shall be construed to limit the free use of data requests discovery and other methods of exchanging information among the parties and the commission. The exchange of information among parties pursuant to data requests is the primary method of discovery in proceedings before the commission. Additional discovery methods as described in Montana Rules of Civil Procedure 26(a) are permitted with commission approval. Unless otherwise specified by the commission, Rule 26(b) of the Montana Rules of Civil Procedure (excepting Rule 26(b)(4)(C)) establish the scope of discovery. Rule 37 governs discovery abuses, motions to compel, and sanctions.~~

(3) Consistent with ARM 38.2.901, only parties in a docket may pre-file written testimony. However, all parties in contested case proceedings, in addition to commission staff, individual commissioners, and hearing examiners, can investigate issues through pre-filed written cross-examination prior to an evidentiary hearing. Parties can only issue pre-filed written cross-examination to the commission with commission approval.

AUTH: 2-4-602, 69-1-110(3), 69-2-101, 69-2-102, 69-3-103, 69-3-106, 69-3-203, 69-3-321, 69-12-201(2), MCA

IMP: 2-4-601, 69-2-101, MCA

Rule Amendment Option 2:

38.2.3301 DISCOVERY AND INVESTIGATION (1) Techniques of prehearing discovery permitted in state civil actions may be employed in commission contested cases, and for this purpose the commission adopts rules 26, 28 through 37 (excepting rule 37(b) (1) and 37(b) (2) (d) of the Montana rules of civil procedure in effect on the date of the adoption of this rule, and any subsequent amendments thereto. In applying the rules of civil procedure to commission proceedings, all references to "court" shall be considered to refer to the commission; references to the subpoena power shall be considered references to ARM 38.2.3302 through 38.2.3305; references to "trial" shall be considered references to hearing; references to "plaintiff" shall be considered references to a party; and references to "clerk of court" shall be considered references to the staff member designated to keep the official record in commission contested cases. Pre-filed written testimony, pre-filed written cross-examination, and responses to that pre-filed written cross-examination are the primary methods of inquiry and investigation prior to an evidentiary hearing in commission contested case proceedings, consistent with ARM 38.2.4204.

(2) Nothing in (1) of this rule shall be construed to limit the free use of data requests among the parties. The exchange of information among parties pursuant to data requests is the primary method of discovery in proceedings before the commission. Additional discovery methods in Montana Rule of Civil Procedure 26(a) are permitted with commission approval. Unless otherwise specified by the commission, Rule 26(b) of the Montana Rules of Civil Procedure (excepting Rule 26(b)(4)(C)) establish the scope of discovery. Rule 37 governs discovery abuses, motions to compel, and sanctions.

AUTH: 2-4-602, 2-4-612, 69-1-110(3), 69-2-101, 69-2-102, 69-3-103, 69-3-106, 69-3-203, 69-3-321, 69-12-201(2), MCA

IMP: 2-4-601, 69-2-101, MCA

38.2.4204 PREPARED PRE-FILED TESTIMONY AND CROSS-EXAMINATION (1) At the direction of the presiding officer, the parties shall submit copies of prepared testimony and accompanying exhibits to be presented at any hearing to all other parties within time limits prescribed by the commission. To facilitate efficient contested case proceedings, pre-filed written testimony, pre-filed written cross-examination, and pre-filed written responses to cross-examination are required.

(2) Consistent with ARM 38.2.901, only parties in a docket may pre-file written testimony. However, all parties in contested case proceedings, in addition to commission staff, individual commissioners, and hearing examiners, can inquire and investigate issues through pre-filed written cross-examination prior to an evidentiary hearing. Parties can only issue pre-filed written cross-examination to the commission with commission approval.

(2)(3) In the discretion of the presiding officer, a witness' pre-filed testimony, pre-filed cross-examination, pre-filed written responses to cross-examination, and accompanying exhibits may:

- (a) be read into the record on direct examination;
- (b) be copied into the record without reading; or
- (c) be identified and offered as an exhibit.

(3) Before any pre-filed testimony is copied in, unless excused by the presiding officer, the witness shall deliver copies thereof to the presiding officer, the reporter, and counsel for all parties.

AUTH: 2-4-612, 69-1-110(3), 69-2-101, 69-3-103, 69-12-201(2), MCA

IMP: 2-4-612, 69-2-101, MCA

REASON: These amendments are necessary to clarify the commission's long-standing data request discovery practice. The commission proposes two alternative rulemakings. Option 1 amends ARM 38.2.3301 and repeals ARM 38.2.4204. The repeal for option 1 is set out in paragraph 4 below. Option 2 amends both ARM 38.2.3301 and 38.2.4204.

The commission seeks input on which is the preferred option to streamline contested case proceedings, while effectively protecting the interests of parties appearing before the commission, the consuming public, and also the commission in sufficiently investigating issues. The reasons for both options are detailed below.

Rule Amendment Option 1:

The Montana Administrative Procedure Act (MAPA) requires the commission to establish rules of practice for discovery in contested case hearings. 2-4-602, MCA. The commission is bound by the Montana Rules of Evidence and may receive evidence in written form. 2-4-612(2), MCA. Typically, the commission requires pre-filed testimony in contested case hearings due to the voluminous and technical subject matter of commission proceedings. See ARM Title 38, chapter 5, subchapter 1 (discussing the commission's minimum rate case filing standards). Parties have the right to conduct cross-examination of all pre-filed testimony. 2-4-612(5), MCA. The commission has the right to investigate and present issues in any contested case hearing. 69-2-102, 69-3-106(1), 69-3-203(2), 69-12-201(2), MCA.

Typically, parties engage in discovery before the commission with data requests, a form of written interrogatories unique to the commission. Commission data requests have resembled depositions by written questions, interrogatories to parties, requests for production, and requests for admission. Data requests are tailored to the nature of the proceeding, the issues being investigated, and the witness who filed testimony. For example, data requests directed at cost of capital experts could be similar to requests for admission on their specific methodology, while requests directed at avoided cost experts could be requesting production of the underlying calculations utilized to support the expert's testimony, and vice versa.

Data requests have been broadly utilized by parties, as well as commission staff and individual commissioners for decades. However, the commission's discovery rule is outdated for several reasons. First, data requests are novel to the commission and are not discussed in either Montana's Rules of Civil Procedure or Rules of Evidence. This creates uncertainty, most importantly when there are discovery disputes prior to a hearing, or with evidentiary disputes during a hearing. Amending the commission's discovery rule will help minimize disputes and provide greater certainty and transparency to commission proceedings.

Second, because the rule tailors the Rules of Civil Procedure to commission proceedings, for example by interpreting references to "court" to refer to the commission, there is risk of misrepresenting the commission's role as exclusively quasi-judicial. This has led various parties to challenge whether the commission can engage in discovery in contested case proceedings. *But see Williamson v. Mont. PSC*, 2012 MT 32 ¶ 31, 364 Mont. 128, 272 P.3d 71 ("The PSC is specifically *not* vested with judicial powers.") (emphasis in original); *and see State Bar v. Krivec*, 193 Mont 477, 484, 632 P.2d 707 (1981) ("The Public Service Commission is an example of an agency where quasi-legislative and quasi-judicial functions may overlap."). The commission believes that amending its rule will clarify the commission's role in discovery, consistent with its quasi-legislative and quasi-judicial powers, and the Rules of Evidence.

To that end, the commission issues this notice of rulemaking to amend ARM 38.2.3301. This rule renames "data requests" as "pre-filed cross-examination." This nomenclature attempts to resolve some of the ambiguities discussed above. Because data requests are almost exclusively directed at pre-filed applications or testimony, the requests are not like typical discovery, but rather more resemble cross-examination. This amended rule reflects that reality.

This revision will clarify the commission's discovery practice. Mont. R. Evid. 611(b)(1) (Pre-filed cross "should be limited to the subject matter of the direct examination . . ."). Yet this revision also retains the ability for parties to investigate additional issues as if on direct examination. This is accomplished by two means: (1) Rule 705 indicates that experts "may in any event be required to disclose the underlying facts or data on cross-examination"; and (2) Rule 611(b)(1) indicates that the commission may, "in the exercise of discretion, permit inquiry into additional matters as if on direct examination." These rules ensure that parties retain their current ability to investigate issues beyond the scope of pre-filed testimony when necessary.

While expanding cross-examination beyond pre-filed testimony should only occur "in the

exercise of discretion" by the commission, the commission believes this is largely a non-issue which does not need clarification by administrative rule. Rather where a party seeks to expand its investigation beyond pre-filed testimony or an application, and that request is not resolved by Rule 705, either the requesting or objecting party can elevate the issue to the commission. This is consistent with the commission's rule on general intervention which also limits intervention to parties who do not broaden the issues in the original proceeding. ARM 38.2.2403.

Pre-filed cross examination also does not place greater burdens on requesting parties. Arguably, disputes concerning pre-filed cross examination require application of the relevance standard from Mont. R(s). Evid. 401 through 403, as opposed to the more lenient discovery scope standard in Mont. R. Civ. Pro. 26(b). The heightened relevance standard would limit robust discovery, and prevent effective resolution of contested case proceedings. Accordingly, the commission intends discovery to continue as historically practiced, with discovery disputes occurring prior to the evidentiary hearing resolved under the commission's discretion, while evidentiary disputes which occur during the evidentiary hearing resolved under the Rules of Evidence. *Williamson v. Mont. PSC*, 2012 MT 32 n. 5, 364 Mont. 128 272 P.3d 71 ("Although the Montana Rules of Civil Procedure do not govern PSC proceedings, 'they may still serve as guidance for the agency and the parties.'") (citation omitted); 2-4-612(2), MCA.

Pre-filed cross examination also codifies the commission's historic practice of who, and to whom, discovery issues. It permits all parties to engage in discovery with each other, and for the commissioners, hearing examiners, and commission staff to engage in discovery. However it prevents parties from engaging in discovery of commissioners, hearing examiners, and commission staff without prior approval. Importantly, by referring to "parties," this rule also permits parties to engage in discovery of commission staff if they have intervened as a party or protested a proceeding.

Commissioner, commission staff, and hearing examiner discovery is consistent with Title 69, MCA, and also the Rules of Evidence. In civil proceedings, the Court may interrogate any witness, whether called by the Court or a party. Mont. R. Evid. 614(a)–(b). To the extent parties challenge the commission's ability to investigate issues in contested case proceedings—notwithstanding 69-2-102, MCA, and various other statutes which explicitly provides that power—this amendment can provide further guidance. Additionally, this language does not prevent commissioners, hearing examiners, or commission staff from additional cross-examination during evidentiary hearings, as this rule is directed at pre-evidentiary hearing practices.

This rule incorporates portions of Mont. R(s). Civ. Pro. 26, and 28 through 37, yet provides parties the opportunity to utilize additional discovery methods permitted by Rule 26(a) upon commission approval. Historically, parties almost exclusively utilized data requests for pre-hearing discovery. The commission believes that focusing discovery around one mechanism, pre-filed cross-examination, will help facilitate efficient proceedings, while at the same time preserving the ability for additional discovery mechanisms upon request.

This rule also retains the incorporation of Mont. R. Civ. Pro. 26(b), as this provides helpful guidelines and case law to determine the scope of discovery before the commission.

However, the amendment does not incorporate Rule 26(b)(4)(C), as this subsection has various requirements for expert witness compensation that would not be practical or reasonable given the commission's substantial pre-filed expert testimony. This rule also retains the incorporation of Mont. R. Civ. Pro. 37, as this provides helpful guidelines and case law to govern discovery abuses.

This rule does not include specific dispute resolution language. Recently several parties have requested that objections to commission staff discovery be resolved by the full commission.

The commission has agreed with this suggestion in several instances, but has declined in others, based on the facts and circumstances at issue. At this time the commission does not think it is necessary to address whether commission staff, hearing examiners, or the full commission should resolve discovery disputes. Rather the commission believes this issue is better resolved with each docket's Procedural Order. This process permits parties, through the reconsideration process, to request a different dispute resolution process if desired. See ARM 38.2.4806.

Finally, this rule includes additional statutory references to reinforce the commission's investigatory authority in various proceedings (69-2-102), includes authority regarding pre-filed cross-examination (2-4-602, 2-4-612(2), MCA, and Mont. R(s). Evid. 611(b)(1), 614(b), and 705), reorders the authority in sequential order, and includes MAPA's requirement for the commission to create a discovery rule as an implementing statute (2-4-601, MCA).

Rule Amendment Option 2:

Option 2 is premised on the same justification for Option 1, which streamlines the commission's current practice of investigating issues. However, it amends the commission's prepared testimony rule to include pre-filed written cross-examination questions, outlines who can file testimony and cross-examination questions, and directs parties in the discovery rule to the prepared testimony rule.

The commission proposes this alternative because pre-filed written testimony and pre-filed cross-examination are not quite discovery, even though both function as discovery before the commission. It might not be reasonable to include in the commission's MAPA-required discovery rule, mechanisms which are not typical discovery mechanisms.

Option 2 reflects that concern. This option also deletes ARM 38.2.4204 sections (1) and (3), as all parties and the commission have access to electronic copies of testimony, exhibits, and pre-filed cross-examination questions through the commission's online system. Requiring additional copies prior to a hearing to all parties, and then again at the hearing to all parties, the court reporter, and counsel, does not assist the commission in its decision-making. Nor does it reflect current practice where parties move for admission of testimony, data requests, and exhibits, without providing a physical copy to all the parties, the commission, and the court reporter.

4. The rule proposed to be repealed for Rule Amendment Option 1 is as follows:

38.2.4204 PREPARED TESTIMONY

AUTH: 69-1-110(3), 69-2-101, 69-3-103, 69-12-201(2), MCA

IMP: 69-2-101, MCA

REASON: See reason section above.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Vicki LaFond-Smith, Department of Public Service Regulation, 1701 Prospect Avenue, Helena, Montana, 59620-2601; telephone (406) 444-6170; fax (406) 444-7618; or e-mail vicki.lafond-smith@mt.gov, and must be received no later than 5:00 p.m., November 8, 2019.

6. The commission, a commissioner, or a duly appointed presiding officer may preside over and conduct the hearing.

7. The Department of Public Service Regulation maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. With regard to the requirements of 2-4-111, MCA, the Department of Public Service Regulation has determined that the amendment and repeal or alternatively the amendment of the above-referenced rules will not significantly or directly impact small businesses.

/s/ JUSTIN KRASKE

Justin Kraske
Rule Reviewer

/s/ BRAD JOHNSON

Brad Johnson
Chairman
Department of Public Service Regulation

Certified to the Secretary of State on September 10, 2019.

[Home](#) | [Search](#) | [About Us](#) | [Contact Us](#) | [Help](#) | [Disclaimer](#) | [Privacy & Security](#)

For questions regarding the content, interpretation, or application of a specific rule, please contact the agency that issued the rule.
A directory of state agencies is available online at <http://www.mt.gov/govt/agencylisting.asp>.

For questions about the organization of the ARM or this web site, contact sosarm@mt.gov.